

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 7, 2008

LATONYA TAYLOR v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2002-A-443 Randall J. Wyatt, Jr., Judge

No. M2007-02727-CCA-R3-PC - Filed August 5, 2009

The petitioner, Latonya Taylor (“Taylor”), appeals from the Criminal Court for Davidson County’s denial of post-conviction relief. She was originally convicted by a Davidson County jury of aggravated robbery, especially aggravated kidnapping, and two counts of kidnapping. For these convictions, the petitioner received an effective twenty-three-year sentence in the Tennessee Department of Correction. The petitioner argues that the post conviction court erred in finding: (1) “that the kidnapping related charges are valid even though the aggravated kidnapping and kidnapping convictions violate the due process protections;” and (2) “that counsel was effective[.]” Following our review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Dumaka Shabazz, Nashville, Tennessee, for the petitioner-appellant, Latonya Taylor.

Robert E. Cooper, Jr., Attorney General and Reporter Renee W. Turner, Assistant Attorney General Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts. The facts of the underlying convictions, as outlined by this court in the petitioner’s direct appeal, are described as follows:

On March 8, 2002, a Davidson County grand jury returned an indictment against the Defendant and her [cousin], Melanie R. Taylor, charging them with aggravated robbery and three counts of especially

aggravated kidnapping. A two-day trial was conducted on the charges in April of 2004.

The evidence at trial established that, on March 15, 1997, Ms. Lynette Michelle McGarr was working at Arby's on Elm Hill Pike in Davidson County. At approximately 10:45 p.m., after the store had closed, the Defendant "tapped on the window" and requested to come inside to make a phone call. According to Ms. McGarr, she was acquainted with the Defendant because the Defendant had worked at the restaurant a few months prior to this time. Ms. McGarr stated, the Defendant "begged and pleaded . . . to let her use the phone. I said, you know, I can't open-you know, let you in. And she kept pleading with-you know, begging me, so I said, okay. Come in real quickly and use the phone." Ms. McGarr let the Defendant in to use the telephone, and she returned to her work. Shortly thereafter, Ms. McGarr observed the Defendant walking toward the store exit. Ms. McGarr attempted to have the Defendant wait to exit the store so that she could "check, make sure there was nobody out there" but, before Ms. McGarr was able to reach the exit, the Defendant was "backing up" with "her hands up."

At that time, two individuals, a man and a woman, entered the restaurant. The woman pointed a gun at Ms. McGarr and ordered her, two other employees who were working at the restaurant, and the Defendant to "go to the back." The Defendant and the other two employees were forced into the freezer. Ms. McGarr was forced into the restaurant's office at gunpoint and ordered to open the safe. The robbers took the money from the safe, and Ms. McGarr was taken to the freezer with the Defendant and the other employees. The robbers then left the restaurant. Once they were certain the robbers were gone, they exited the freezer, and Ms. McGarr telephoned the police.

According to Ms. McGarr, the Defendant came into the restaurant earlier that evening to order food. She also saw the man and the woman who later robbed the store in the restaurant at the same time as the Defendant and, although they stood behind the Defendant, she did not observe any interaction between them. The other two Arby's employees, Chris Halpin and Christopher Rigsby, gave testimony similar to that of Ms. McGarr.

Following interviews with the Defendant, she was developed as a suspect in the crimes. On July 19, 2001, police conducted video surveillance of the Defendant and a confidential informant named Brook Nason in a hotel room at the Peachtree Inn. During a conversation between the two women, the Defendant admitted, "I

plotted it all out.” The Defendant also admitted to sharing in the proceeds of the robbery.

Thereafter, the Defendant was interviewed by TBI Agent Willie Stout and confessed to her involvement in the crime. The Defendant told Agent Stout that they stole approximately \$4,000 from the Arby's.

The Defendant did not testify on her behalf at trial; she did, however, offer the testimony of her mother, Ms. Diane Taylor. Her mother testified that the Defendant had problems at school, dropped out in the tenth grade, and started drinking at a young age. Ms. Taylor described the relationship between her daughter and the co-defendant, Melanie Taylor. She stated, “Melanie was the leader. She would just basically, tell Latonya, you know what to do.”

The jury found the Defendant guilty as charged for the aggravated robbery and especially aggravated kidnapping of Ms. McGarr and guilty of the lesser-included offense of kidnapping as to the other two store employees. Following a sentencing hearing, the trial court sentenced the Defendant to eight years at 100% for the aggravated robbery conviction, fifteen years at 100% for the especially aggravated kidnapping conviction, and three years at 30% for each kidnapping conviction. The trial court ordered the sentences for aggravated robbery and especially aggravated kidnapping to be served consecutively to one another, for an effective sentence of twenty-three years at 100%.

State v. Latonya Taylor, No. M2005-00313-CCA-R3-CD, 2006 WL 2206064, at *1-2 (Tenn. Crim. App., at Nashville, July 31, 2006) perm. app. denied (Tenn. Dec. 18, 2006).

Following this court’s denial of the petitioner’s direct appeal, she filed a timely pro se petition for post-conviction relief and counsel was appointed. The petitioner then filed an amended petition. An evidentiary hearing was held on September 20, 2007, and by written order, the post-conviction court denied the petitioner relief. The petitioner then filed a timely notice of appeal to this court.

Post-Conviction Hearing. At the hearing, the petitioner testified that counsel was ineffective because she failed to raise State v. Anthony, 817 S.W.2d 299 (Tenn. 1991) at trial or on appeal.¹ The petitioner was told by another inmate that, under Anthony, she could not be charged

¹ The only reference within the petitioner’s brief to counsel’s performance on appeal is one sentence stating “[a]lthough counsel mentioned Anthony on [a]ppeal, her main argument was the criminal responsibility.” As such, we will consider any issues pertaining to counsel’s performance on appeal as waived and limit our review to counsel’s
(continued...)

with both robbery and kidnapping when robbery was the essential crime. The petitioner advised counsel of Anthony both orally and in writing. The petitioner stated that she specifically requested counsel to argue Anthony at trial, and counsel agreed. However, the petitioner stated that counsel never raised Anthony at trial or on appeal. On cross examination, the petitioner admitted that trial counsel had raised Anthony on appeal.

The petitioner testified that counsel was ineffective because she did not communicate with her during the trial process. She stated that she did not have any interaction with counsel. She explained that counsel never met with her, never wrote to her, and did not visit her while she was in jail. The petitioner further testified that she only spoke with counsel while she was in court. The petitioner stated that before trial she requested copies of different cases and counsel failed to provide them. She additionally stated that after trial she requested other paperwork and the trial transcript from counsel, but never received it. Finally, the petitioner acknowledged that she discussed trial strategy with counsel, that counsel explained the discovery that she did not understand, and that she received two letters from counsel during the trial process.

Counsel testified that she attempted to convince the jury that the petitioner was not guilty of the three especially aggravated kidnapping charges. She explained that it was “[s]omewhat of a victory” because, other than the robbery, the jury convicted the petitioner of only one count of especially aggravated kidnapping and two counts of kidnapping. Finally, trial counsel testified that she raised Anthony in her motion for new trial and again on appeal. On cross examination, trial counsel admitted that she did not expressly state or use the Anthony case when she argued the issue. However, she explained that she argued “the essence” of the case.

In denying relief, the post-conviction court concluded that the Anthony issue had been previously considered by both the trial and appellate court and, therefore, not properly raised in the post-conviction petition.

Standard of Review. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103 (2006). The Tennessee Supreme Court has held:

A post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court’s review of a legal issue, or of

¹(...continued)

performance at trial. See Tenn. Ct. Crim. App. R. 10(b) (“Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”).

a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotations and citations omitted). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Id.; see also T.C.A. § 40-30-110(f) (2006). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Vaughn 202 S.W.3d at 116 (citing Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

[T]he right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to ‘reasonably effective’ assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal citation and quotation omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer’s performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984) and Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim[, and] a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney’s conduct fell below an objective standard of “reasonableness under prevailing professional norms.” Id. (quoting Strickland, 466 U.S. at 688). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that but for counsel’s errors the result of the proceeding would have been different.” Id. “A ‘reasonable probability is a probability sufficient to undermine confidence in the outcome.’” Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

I. Alleged Due Process Violation. The petitioner argues that “the trial court erred in finding that the kidnapping related charges were valid [because] the aggravated kidnapping and kidnapping conviction violated due process protections.” The petitioner argues that under State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), and the two-prong test established in State v. Dixon, 957 S.W.2d 532 (Tenn. 1997), a defendant cannot be charged with both robbery and kidnapping when the additional

movements to commit the kidnapping are “essentially incidental” to the robbery because it is a violation of due process. Anthony, 817 S.W.2d at 306. In response, the State argues that the post-conviction court properly denied the petitioner relief. We agree with the State.

In State v. Anthony, the Tennessee Supreme Court set forth a test to determine whether dual convictions for kidnapping and another felony violate due process. Anthony, 817 S.W.2d at 306. In such cases, Anthony required trial courts to determine whether a defendant’s actions in committing the underlying offense will also support a separate conviction for kidnapping. The test articulated by the Anthony court is: “whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.” Id. The Tennessee Supreme Court modified the rule in Anthony with State v. Dixon, 957 S.W.2d 532, 535 (Tenn.1997). The Dixon court replaced the “essentially incidental” analysis in Anthony. The Dixon test now requires courts to initially determine

[I]f the movement or confinement of the victim was beyond that necessary to consummate the accompanying crime. This first prong of the Dixon test is a threshold determination. A showing that the movement or confinement was merely helpful to the commission of the accompanying crime will not establish a due process violation under the first prong of the Dixon test. Rather, the first prong of the Dixon test focuses on whether the movement or confinement was necessary to consummate the accompanying crime. Id. If the movement or confinement was necessary to consummate the accompanying crime, then a separate kidnapping conviction violates due process, and no further analysis is required.

If, instead, the movement or confinement was beyond that necessary to consummate the accompanying crime, then the second prong must be addressed. The second prong considers whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant’s risk of detection; or (3) created a significant danger or increased the victim’s risk of harm.

State v. Richardson, 251 S.W.3d 438, 442-443 (Tenn. 2008) (internal citation and quotation omitted).

In claiming a violation of due process, the petitioner cites to and relies upon State v. Richardson, M2005-01161-CCA-R3-CD, 2006 WL 1173168 (Tenn. Crim. App., at Nashville, May 4, 2006), overruled by State v. Richardson, 251 S.W.3d 438 (Tenn. 2008), and argues that it is similar to the instant case. It is not necessary to undergo an analysis of this issue because two days prior to the filing of the petitioner’s brief, the Tennessee Supreme Court reversed State v.

Richardson, M2005-01161-CCA-R3-CD, 2006 WL 1173168 (Tenn. Crim. App., at Nashville, May 4, 2006), and rejected the analysis upon which the petitioner now relies. Accordingly, the petitioner is not entitled to relief on this issue.

II. Ineffective Assistance of Counsel. Next, the petitioner contends that “had [trial counsel] researched and argued that the kidnapping related charges could not be sustained as a matter of law under Anthony, those counts would have been dismissed during the Judgment of Acquittal.” In response, the State contends that the petitioner has failed to show deficient performance or prejudice. We agree with the State.

In regard to the petitioner’s claim that counsel was not effective, the trial court held a hearing and stated the following:

The Court finds that [counsel] testified that she argued the substance of the Anthony issue before the trial court in the Petitioner’s Motion for Judgment of Acquittal and Motion for new Trial. The Court finds that [counsel] testified that she submitted to the Court that the Petitioner’s kidnapping convictions could not be sustained because the confinement of the victims in this case was insufficient to support separate convictions apart from the Aggravated Robbery. The Court finds that the Petitioner’s Motions were denied. The Court finds that [counsel] testified that she believed the Anthony issue was incorporated in the Petitioner’s appeal when the sufficiency of the evidence was challenged. The Court finds that the Court of Criminal Appeals specifically addressed whether sufficient evidence existed for the Especially Aggravated Kidnapping conviction. (citation omitted). The Court finds that the Court of Criminal Appeals held that the Petitioner’s convictions were supported under the theory of criminal responsibility. The Court is of the opinion that this issue has been previously considered and denied by both the trial court and the Court of Criminal Appeals and, therefore, the issue is not properly raised in this petition.

In the instant case, the Petitioner was convicted of aggravated robbery, especially aggravated kidnapping, and two counts of kidnapping. Counsel admitted that at the motion for judgment of acquittal and the motion for new trial, she “did [not] specifically state case law of State v. Anthony. I didn’t use those words, but I certainly this – here it is. I made – I made the argument of Aggravated Kidnapping.” She continued to explain, “I argued, the – essence. That – that the kidnapping should merge into the robbery. . . . You see, I did make [the] State v. Anthony argument. I just didn’t quote the case law.” We have reviewed portions of the transcript from the motion for new trial and conclude that counsel sufficiently raised Anthony before the trial court. We base our decision in part on the trial court’s response to counsel’s motion. The trial court denied the motion and specifically stated, “I’m inclined to agree with the State’s argument . . . about criminal responsibility. There

could be other little issues that would come into play in this matter. I'm thinking about, like, Anthony sort of issues that I'm, frankly, not even sure that with going into a freezer and this and that and the other, that that would -- would impact this particular set of facts." Despite counsel's failure to expressly cite to Anthony, the trial court was keenly aware of the potential Anthony issue and found that it did not apply. In reaching our conclusion we do not minimize the importance of citing relevant case authority to the court and stress that the better practice is to do so. See Bobby Joe Lester v. State, No. W2006-02042-CCA-R3-PC, 2008 WL 1700220 at *9-10 (Tenn. Crim. App., at Jackson, April 7, 2008) (rejecting identical claim that counsel was ineffective for failing to expressly cite to or argue State v. Anthony on appeal). However, counsel's failure to expressly cite Anthony does not entitle the petitioner to post-conviction relief because the substance of the argument was addressed and rejected by the trial court. Id. Accordingly, we conclude that the post conviction court properly denied relief because the petitioner has failed to demonstrate that counsel's performance was deficient or any resulting prejudice.

Conclusion

Based on the foregoing analysis, the judgment of the post-conviction court is affirmed.

CAMILLE R. McMULLEN, JUDGE